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Solutions 100

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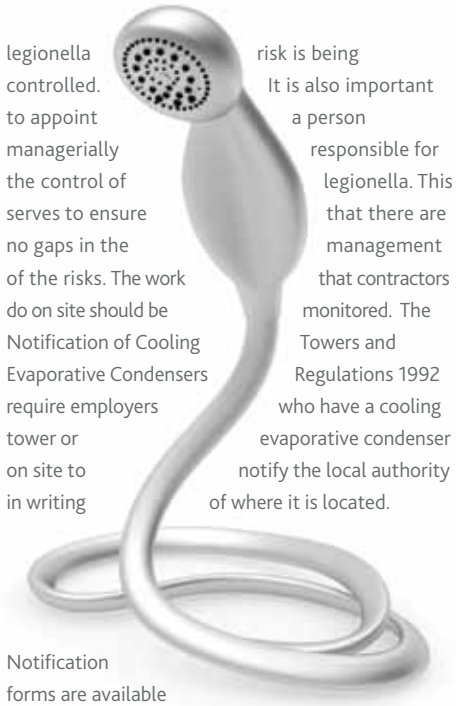
Legionella in the workplace

The recent legionnaire's disease outbreak in Edinburgh, which led to several fatalities, has once again highlighted the importance of taking adequate precautions to protect people from legionella bacteria. However, the risk is often misunderstood or overlooked. Here we take a close look at the issues involved and give tips on how to improve management standards.

Legionellosis is a group of diseases that includes legionnaires' disease. This potentially fatal infection has symptoms similar to flu and pneumonia. *Legionella pneumophila*, the bacteria responsible for legionnaires' disease, exist naturally in external watercourses and can easily transfer to water used in buildings via air-conditioning and recirculated hot- and cold-water systems. In certain conditions, bacteria can multiply to dangerous levels in stored water. Legionnaires' disease is caused when water droplets containing the bacteria are inhaled. Typical sources of such water droplets include shower sprays and the exhausts from wet cooling systems and evaporative condensers. Industrial cooling towers and evaporative condensers may create the risk of off-site cases of legionnaires' disease.

Legal requirements

Employers, and those responsible for building maintenance of installations that carry a legionella risk, must conduct an assessment of that risk and take steps to prevent or minimise such risks under the Health and Safety at Work, etc Act 1974 and the Control of Substances Hazardous to Health Regulations 2002. Suitable control measures should then be introduced to manage the risk. Where a foreseeable risk of exposure has been found, the first measure is to completely avoid the use of a water system, parts of it or systems of work giving rise to it. Often, this is not practicable and a written scheme for controlling the risk should be devised, implemented and efficiently managed. Records of the results of the written scheme and who is responsible for its management need to be retained for inspection. Dated documentary evidence demonstrates that the legionella risk is being controlled. It is also important to appoint a person managerially responsible for the control of legionella. This serves to ensure that there are no gaps in the management of the risks. The work that contractors do on site should be monitored. The Notification of Cooling Towers and Evaporative Condensers Regulations 1992 require employers who have a cooling tower or evaporative condenser on site to notify the local authority in writing of where it is located.



Notification forms are available from local environmental health departments.

Competence

A requirement of the HSE's Approved Code of Practice relating to legionella is to insist on the competence of the appointed person who may carry out the assessment, or of those to whom the appointed person has delegated the task.

If the assessment shows that there is a reasonable foreseeable risk and it is reasonably practicable to prevent exposure or control the risk from exposure, the person on whom the statutory duty falls should appoint a person or persons to take managerial responsibility and to provide supervision for the implementation of precautions.

The actual person who carries out the assessment and who draws up and implements prevention measures should have the ability, experience, instruction, information, training and resources to enable him or her to carry out his or her tasks competently and safely.

Water testing and treatment

Since legionella bacteria are widespread in the environment, they cannot be prevented from entering water systems which means that the water needs to be regularly tested. In chlorinated water systems, checking should be a continuous, automated process. Dip-slides can detect general bacterial growth, but not legionella specifically. Sampling of cooling towers for legionella should be done on a quarterly basis. Good record-keeping is essential and records of inspections and tests should be kept for at least two years.

Water treatment should be carried out on a regular basis, immediately after any work that requires shutting down or repressurising the system, and after any suspected outbreak of legionellosis. Water can be treated either manually or by automatic dosing. Equipment must be properly installed, maintained and monitored and it is essential to ensure professional, competent people do all the work.

A Recommended Code of Conduct for Service Providers exists, supported by the British Association for Chemical Specialities, the Water Management Society and the HSE. It is important to check if the provider has signed up to the code of conduct.

Further information

HSE legionellosis microsite — www.hse.gov.uk/legionnaires/index.htm

More changes to the EU social security rules

Changes to the EU social security provisions for employees working regularly in more than one EU country finally came into force on 29 June in the guise of amendment regulations EU 465/2012. *Solutions* takes a look at the key changes.

As with most amendment regulations of this type, officials have taken the opportunity to tidy up a series of minor matters. One of these matters is clarification that, where one employee is replacing another, the A1 certificate will only be refused where one posted worker is replacing another posted worker. This will remove instances of certificates being refused where a posted worker is replacing a local employee.

Where an employee works regularly in more than one EU Member State, the basic rule is that contributions can only be paid in a single country at any given time, and there is a series of tiebreakers to determine in which country the contributions are payable. While the policy and legislative intentions as to where contributions should be paid were reasonably clear, it was relatively straightforward to circumvent these intentions by creating a second employment or by having additional duties in another country.

Closing loopholes

The new provisions are designed to close the more blatant loopholes and will do so by ignoring certain employment arrangements and activities. A different set of tiebreakers will apply. The starting point will still be to identify the country in which an individual is resident. Residence is defined as habitual residence where the individual has his or her strongest personal ties. This will be where the individual owns property, where immediate family live, and where he or she has investments and pension arrangements. Assuming that habitual residence is in the UK, the rules will work as follows.

- Contributions will be payable in the UK if the employee has a substantial part of his or her workdays in the UK. Substantial is defined as being at least 25% of the time. If at least 25% of the workdays are in the UK, National Insurance Contributions will be payable irrespective of where the employer is located.
- If the 25% test is not satisfied and there is a single EU-based employer, the contributions are payable where the employer has its registered office or place of business.
- If the 25% test is not satisfied and there are two or more employers in the same EU country, contributions are payable in that country.
- If the 25% test is not satisfied and there is an employer in the UK and a second employer in another EU country, contributions are payable where the non-UK employer has its registered office and place of business.
- If the 25% test is not satisfied and there are two or more employers, and these employers have their registered offices in different EU countries but not in the UK, contributions are payable in the UK.

For the purpose of determining where contributions are payable, a registered office or place of business is defined as the place where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. This definition is intended to remove the possibility of a company having little more than a "brass plate" registration in a country where contributions are cheap, with the real operation of the business being carried out in a different EU country.

Marginal activities

The final step to tighten the legislation is to use the concept of marginal activities and to exclude such activities from the factors used to determine where contributions are payable. There is no legislative definition of marginal activities but they are described in the guide to the workings of the EU Social Security provisions as activities that are permanent but insignificant in terms of time and economic return. The guidance suggests that time of no more than 5% in a country be regarded as marginal activity and ignored when determining where contributions are payable. In fairly rough terms, this means up to a day a month in a particular country being disregarded.

Flight crew

One group of workers singled out for specific treatment is flight crew and cabin crew on international passenger or freight services. Clearly they would be working in more than one country but there could be real difficulties establishing where they are actually working and for how long a time.

Under the pre-1 May 2010 rules, there were special provisions for aircrew which linked the contribution liability to where the airline had its registered office. These rules were withdrawn from 1 May 2010 and aircrew then had their contribution position determined in the same way as any other employee working regularly in more than one EU country. This brought a lot of uncertainty coupled with claims from social security authorities that arrangements were being manipulated in order to avoid liabilities in countries where the contribution costs were high.

To bring some certainty back into the arrangements, the legislation has been amended so that contribution liabilities for aircrew will arise in the country where the home base is situated. "Home base" is already defined in EU civil aviation law and is the place where a crew member normally starts and ends his or her tour or tours of duty. It is a place where under normal conditions the employer is not responsible for providing accommodation.

The amended legislation recognises that the home base may change on a regular basis due to the way the airline industry works or because of seasonal demand. In such circumstances, where contributions are payable they should remain stable and not move from country to country. There is no additional legislation or guidance setting out where contribution liabilities are to arise in cases where the base changes frequently.

Transitional rules

While these changes for aircrew and other employees are intended to give increased certainty as to where contributions are payable and to close some loopholes, it may be some time before this is achieved. As is usual with such changes to the EU social security provisions, there are transitional rules that will allow existing liabilities to continue until a material change in circumstances or a period of 10 years, whichever is sooner. What is considered "material" will no doubt cause a few arguments.

Where the new rules would mean a change in where contribution liabilities arise, and despite the transitional rules, an employee can request that the new rules be applied. Where an employee makes such a request on or before 29 September 2012, the new rules shall apply as from 28 June 2012. Requests made later than 29 September shall apply from the beginning of the following month.

The key to the matter will continue to be the A1 certificate. This should be requested to confirm where contribution liabilities arise and they are generally sought from the social security authorities in the country in which an employee is resident. In the absence of such certificates, liabilities can be pursued by different social security authorities; these cases are often difficult to resolve.

Expert view

Government employment law reforms

When the coalition Government took office in May 2010 it launched a review of employment law that is scheduled to last most of the current Parliament. This is the latest in a line of articles about the Government's employment law policy.

The Government has already introduced a number of changes to the unfair dismissal regime, notably the increase in April 2012 of the qualifying period of service to bring such a claim and some changes to the employment tribunal system — in respect of costs and an increase in fines for vexatious litigants. It has also embarked on a large number of consultations and "calls for evidence" on a wide range of employment law issues. This article, in bullet-point form for quick and easy reference, focuses on developments since the Queen's Speech in May 2012 and on the proposed new legislation.

Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Bill makes provision for a number of employment law reforms.

- All claims to employment tribunals will first have to go for **ACAS conciliation**.
- A **rapid resolution scheme** has been proposed, headed by employment law "experts" for some claims (yet to be specified).
- Compromise agreements are to be renamed **"settlement agreements"**. This is the centrepiece of the Bill: under these agreements, employers would be able to offer payoffs to employees for the immediate termination of their contracts. There will be consultation on the principles of guidance for employers on this issue and on model documents and letters. (Note that the Beecroft proposals for "compensated no-fault dismissals" for micro companies have now been dropped.)
- **"Protected conversations"** — This proposal will provide employers with an opportunity to have an honest and frank discussion with an employee about performance and retirement without it being held against them at a later date.
- A new limit (cap) on the **compensatory award for unfair dismissal** (current maximum is £72,300).
- **Penalties for employers** whose breach of employment rights has an "aggravating" feature.
- A "public interest" test for **whistleblowing claims**.

Reforms to the Equality Act 2010

The Government has also announced reforms to the Equality Act 2010. The measures announced include:

- consultation on repealing employers' liability for third-party harassment — the so-called "three strikes and you're out" procedure
- repealing the employment tribunal's power to make recommendations after a discrimination case that apply to all of an employer's staff
- abolition of the statutory questionnaires used in discrimination cases
- a review of public sector equality duty.

The composition and role of the Equality and Human Rights Commission is also under review.

Children and Families Bill

The Children and Families Bill will include further changes to parental leave — available to parents on an equal basis — and the extension of flexible working to all employees. Under the proposals for flexible working, the 26-weeks' qualifying period will remain but employers will be encouraged to consider flexible working at the point of recruitment. Requests would be considered using the current statutory procedure but the request would have to be considered "reasonably". The scheme would be accompanied by a code of practice.

Other measures

Other measures proposed include:

- **streamlining of ET rules and procedure** and the introduction of fees for tribunals
- further consultation on **TUPE** and consultation period for **collective redundancies** following the "calls for evidence" on these issues
- new portable disclosure service (re CRB) in 2013.

Coalition Government employment law policies — a summary

- Act on bankers' bonuses.
- Cut red tape and reduce regulatory burden, known as "The Red Tape Challenge".
- Review workplace law — the Government produces regular reports on its progress in this area.
- End "gold-plating" of European Union law, eg aspects of the TUPE Regulations 2006.
- Cap on immigration.

Top business issues

Every month we bring you the top issues from callers to our telephone advice lines. These were the top issues in July.

Tax & VAT	Employment	Commercial Legal	Health & Safety
1. P11D issues — loan write offs, late filing penalties for P11db, accommodation benefit.	1. Conduct.	1. Contract.	1. Risk assessment.
2. Associated companies — complexities caused by limited liability partnerships with corporate partners.	2. Absence/sickness.	2. Company.	2. Legislation.
3. VAT — Place of supply.	3. Disciplinary procedure.	3. Property & leases.	3.Accidents/RIDDOR.

Legislation timetable

Previous issues of Solutions are available online at: www.cronersolutions.co.uk/newsletters.html

Legislation timetable

Area	Legislation	Details	Date
Family Leave	EC Parental Leave Directive (96/34/EC)	The EU framework agreement, which requires Member States to increase parental leave to 18 weeks, is expected to be brought into force by March 2013. (This was originally anticipated in March 2012; however, the UK is taking advantage of a one-year grace period which is provided within the directive.)	March 2013
Employment Tribunals	TBC	It is anticipated that the Government will introduce fees for workers to lodge a claim against their employer at employment tribunals. Workers are expected to face a fee of between £150 and £250 to lodge a claim and a further £1000 or more to proceed to a hearing.	April 2013
Wages	Public Bodies Act 2011	This legislation provides for the abolition of the Agricultural Wages Board (AWB). The role of the AWB is to set minimum wages and other terms and conditions for English and Welsh workers employed in agriculture. These workers will eventually fall within the scope of the National Minimum Wage.	TBC
Equal Treatment	Council Directive 86/613/EEC	In 2010, Europe issued a directive to all Member States giving them two years to make provision for self-employed workers, assisting spouses and life partners of self-employed workers to give them the right to maternity leave and allowance for 14 weeks. The UK currently makes provision for a woman who is self-employed for at least 26 weeks (within a 66-week period) up to the beginning of the "expected week of childbirth" to receive standard maternity allowance provided she achieves the earnings threshold of £30 per week over a 13-week period. Therefore, the implementation of this EU directive is not expected to have a wide-reaching impact when it is accommodated into national law in August.	05/08/12

Update on totting and transport

The Health and Safety Executive (HSE) has revised and updated its guidance on the hand-sorting of waste recyclables, known as "totting", with vehicle assistance.

The HSE's newly revised guidance aims to help resolve workplace transport problems and, in particular, prevent accidents to pedestrians involved in totting activities at waste and recycling facilities.

In the past, several fatalities have occurred when pedestrian totters have been struck by manoeuvring plant/vehicles because effective vehicle/pedestrian segregation has not been achieved.

The guidance focuses on health and safety considerations for those removing waste or recyclables through sorting by hand-picking from the floor activities.

The guidance is particularly targeted at employers, managers and supervisors. It includes advice about how to assess hazards and provides solutions that will help to eliminate or reduce the risk of serious injury or ill health.

While its main focus is on solving workplace transport problems and preventing accidents to the pedestrians involved in totting activities, the guidance also touches on:

- manual handling
- slips and trips
- hygiene and welfare
- other environmental considerations.

The HSE emphasises that employers, managers and supervisors should consult the workforce, drawing on their experiences and requesting suggestions regarding health and safety arrangements and working practices. The guidance was produced by the HSE in consultation with the Waste Industry Safety and Health (WISH) forum.

WASTE 18: *Hand Sorting of Recyclables (Totting) with Vehicle Assistance* can be accessed via the HSE website at *www.hse.gov.uk/waste/transport.htm*.

Health & safety

Fees for intervention update

The Health and Safety Executive (HSE) already recovers its costs in a range of industries but has proposed to extend its current systems of cost recovery to include a fee for intervention.

What is a fee for intervention?

A fee for intervention will mean an inspector will be required by law to charge for the inspection and any subsequent actions when a material breach of the law has been found. A "material breach" is when, in the opinion of the inspector, there has been a breach of health and safety law which requires them to make a formal intervention.

The HSE is proposing to replace the existing Health and Safety (Fees) Regulations 2010 with new regulations. In addition to carrying over the existing fees, it is anticipated that these new regulations would place a duty on the HSE to recover the costs of its interventions under the Health and Safety at Work, etc Act 1974 and other health and safety law.

Key points

- It was intended that the changes would come into force in April 2012 but have now been delayed until at least October 2012.
- Although the changes place no new health and safety duties on businesses, they place for the first time a duty on the HSE to recover the costs of its interventions in certain circumstances.
- Costs would be recovered if, during an inspection or investigation, a material breach (a failure to adhere to health and safety law identified by an inspector as requiring formal action) is discovered.
- Fees would apply up to the point where the HSE's intervention in supporting businesses in putting matters right has concluded.
- The HSE is keen to emphasise that law-abiding businesses will be free from costs.
- Under the proposals, the HSE will recover costs at current estimates of £133 per hour. Costs of any specialist support required by the HSE would also be passed on.
- Due to public sector cuts, HSE funding is to be cut by 35% over four years starting in 2011, which would be expected to result in a lower level of enforcement and a consequent decrease in health and safety standards throughout Great Britain, with ensuing costs to individuals and their dependents (notably the pain, grief, suffering and loss of earnings from work-related injuries and ill health), to employers (in sick pay etc) and to the Government (mainly NHS costs, benefits paid and taxes lost).
- Cost recovery will allow the HSE to provide a higher level of enforcement than otherwise possible with the cuts and avoidance of the above costs.

Response

The Federation of Small Businesses (FSB) has expressed concern that the proposals by the HSE to charge small firms for "material" faults found during inspections could "damage relationships" and may be seen as a way to raise revenue rather than improving compliance.

The HSE estimates that for an inspection that results in a letter, the cost to business could be at least £750. However, the FSB says that for a small or micro business, a bill of £750 or more for a material fault could be "extremely damaging", especially during difficult economic times.

The FSB is arguing that this will disproportionally affect micro firms as fees of this level will have a greater affect on the ability of the business to function and grow.

Asbestos update

The law regarding asbestos was changed on 6 April 2012, following the European Commission's "Reasoned Opinion" on the UK Government's transposition of Directive 83/477/EEC, as amended by Directive 2003/18/EC on the protection of workers from the risks of exposure to asbestos at work. Directive 2003/18/EC was implemented in Great Britain by the Control of Asbestos Regulations 2006. The Reasoned Opinion, basically a warning to comply with EU legislation, confirmed the Commission's view that the UK had not fully implemented Article 3(3) of the directive, which provides for the exemption of some types of lower-risk work with asbestos from three requirements of the directive: notification of work; medical examinations; and record keeping.

The required changes mean that fewer types of lower-risk work will be exempt from the three requirements. The existing 2006 regulations have been revoked in their entirety and a single set of revised regulations — the Control of Asbestos Regulations 2012 — issued. Among other changes, the regulations introduce new definitions of asbestos cement, asbestos coating, asbestos insulation, asbestos insulating board, short duration work and textured decorative coatings. The definition of "relevant doctor" has been amended and there is also a new definition of "licensable work with asbestos".

The changes are most likely to affect employers who carry out short-duration work on plant and equipment or buildings which contain asbestos materials and those who procure such work.

Call for businesses to raise heart awareness

The Institution of Occupational Safety and Health (IOSH) has called on British businesses to play their part in reducing the numbers of heart attacks and heart disease among employees.

Diseases of the heart and circulatory system are said to account for 191,000 UK deaths each year, while one in five men and one in seven women die as a result of coronary heart disease.

IOSH has published new advice for businesses on how they can promote healthy living among their workforces and support the rehabilitation of heart disease victims.

The occupational health advice includes tips on: rehabilitation; signs and symptoms of someone suffering a heart attack; signposts to the key organisations and sources of information for more help; and legal advice on employers' statutory duties on occupational health.

Case law update

TUPE: Relocation leads to "dismissal"

In the recent case of *Abellio London Ltd v Musse & Others* [2012] UKEAT/0283/11, the EAT had to consider whether a relocation, following a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), entitled the employees to resign and claim they had been "dismissed" for the purposes of the regulations.

CentreWest ran the 414 bus route in west London. When it lost the contract to Abellio, the bus drivers working on that route had to relocate: from CentreWest's west London depot at Westbourne Park to Abellio's south London depot in Battersea, which is six miles away. As a result, several of the bus drivers had increased journey times to and from work of between one and two hours a day. Five drivers resigned. The claimants brought various tribunal claims against both CentreWest and Abellio (the former under case reference [2012] UKEAT/0631/11). Under the regulations, an employee's resignation is deemed to be a "dismissal" if it is in response to a substantial change to his or her working conditions to his or her material detriment (regulation 4(9)). The tribunal found that the relocation was a "substantial" change as, although the move was only six miles, the increase in travel times made it substantial. The "material detriment" test is looked at from the employees' perspective and the tribunal found that the employees' position on this was reasonable. The tribunal therefore found that the five claimants had been constructively dismissed and that this was automatically unfair because the dismissals were for a transfer-related reason, and there was no "economic, technical or organisational" reason for this.

On appeal to the EAT, the bus companies sought to argue that the subjective test for "material detriment" failed to recognise the consideration that the regulations give to the employer's interests. On this point the EAT found that the tribunal had applied the correct subjective test and the respondents' arguments failed. This means that employees have a fairly low hurdle to overcome in order to show material detriment. The ETO defence was not appealed, so the position remains (until dealt with by a higher court than the EAT) that, in order to make out an ETO defence, there needs to be more than just a change of location.

Of clear concern for incoming contractors is the fact that where there is only a change of location, they will not have a defence against claims of unfair dismissal and their only argument will be that there is not a substantial change to the employees' material detriment allowing them to walk out and claim constructive dismissal. As this case shows, however, the subjective test for "material detriment" means that these types of claim are much simpler for an employee to make out than for an employer to defend.

Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to cronerinfo@wolterskluwer.co.uk

Q. We have received a letter of resignation from an employee. In it they have said they will not work the full four weeks that they are contractually bound to. We really need them to work this period of time to allow a handover of work so that someone else can take over the key elements of their role. What can I do if they refuse to work their notice?

A. You cannot force an individual to work and this situation is frustrating because, if the tables were turned and you were looking to dismiss an individual without wishing them to work their notice, you would need to pay them for any notice period in order to prevent a claim for breach of contract.

You might also wish to point out that, by failing to work their notice period, they are technically in breach of their contract and there may be grounds to take civil action against them.

From a positive perspective, if the employee does not present himself or herself for work you would not be obliged to pay any remaining notice pay (ie notice not worked). By identifying these points to the employee you might be able to persuade them to work.

If the employee does not work their notice it may be possible for you to pursue a civil law claim and seek to recover damages for the costs of hiring a replacement at short notice. However, this is a costly course of action to pursue which would require you to take legal advice; furthermore, you would need to demonstrate actual financial loss. Often, this is only practical for high-ranking employees who are exceptionally costly to cover at short notice.

Contact us

If you have any questions about the topics covered in Solutions please call 0800 634 1700, or e-mail cronerinfo@wolterskluwer.co.uk

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